

February 11, 2019

Mr. Paul Watkins
Assistant Director, Office of Innovation
Bureau of Consumer Financial Protection
1700 G Street, N.W.
Washington, D.C. 20552

**Re: Proposed Policy on No-Action Letters and Product Sandbox;
Docket No. CFPB-2018-0042**

Dear Mr. Watkins:

The American Bankers Association,¹ U. S. Chamber of Commerce,² Consumer Bankers Association,³ and Housing Policy Council⁴ (collectively, the Associations) appreciate the opportunity to comment on the proposal (the Proposal) of the Bureau of Consumer Financial Protection (Bureau) to revise its 2016 No-action Letter policy (2016 Policy)⁵ and establish a product sandbox (Sandbox).⁶

We believe it is critical to maintain an effective Office of Innovation within the Office of the Director and create a robust No-action Letter (NAL) process and Sandbox to ensure consumers have access to the innovative financial products, services, and delivery mechanisms they expect. While we support the Proposal, we urge the Bureau to refine further its policy and more closely align it with the well-established and effective programs of other federal regulators

¹ The American Bankers Association is the voice of the nation's \$17 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits, and extend nearly \$10 trillion in loans.

² U. S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million companies of every size, sector, and region. The Chamber created the Center for Capital Markets Competitiveness to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy.

³ The Consumer Bankers Association is the trade association for today's leaders in retail banking – banking services geared towards consumers and small businesses. The nation's largest financial institutions, as well as many regional banks, are CBA corporate members, collectively holding two-thirds of the industry's total assets. CBA's mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business.

⁴ The Housing Policy Council is a trade association comprised of the leading national mortgage lender and servicers, mortgage and title insurers, and technology and data companies. HPC advocates for the mortgage and housing marketplace interests of its members in legislative, regulatory, and judicial forums. Our interest is in the safety and soundness of the housing finance system, the equitable and consistent regulatory treatment of all market participants, and the promotion of lending practices that create sustainable home ownership opportunities in support of vibrant communities and long-term wealth-building for families.

⁵ Policy on No-Action Letters; Information Collection, 81 Fed. Reg. 8686 (Feb. 22, 2016).

⁶ Policy on No-Action Letters and the BCFP Product Sandbox, 83 Fed. Reg. 64,036 (Dec. 13, 2018).

including the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC). To achieve that outcome, we recommend that the Bureau:

- Strengthen liability protections for companies that comply in good faith with the terms of a NAL or Sandbox approval;
- Coordinate proactively and fully with other regulators;
- Ensure the confidentiality of data and information;
- Strengthen and formalize process controls to enhance the transparency, fairness, and predictability of the NAL and Sandbox process; and
- Commit to amending relevant regulations when program experience demonstrates it is warranted.

I. Innovation is Essential to Meet Consumers’ Needs and Promote Financial Well-Being.

Financial services innovation has historically benefitted consumers and continues to have tremendous potential to do so. As the history of banking amply demonstrates, innovation promotes financial inclusion, expands access to credit, and improves access to information, which in turn, supports informed decision-making and financial well-being. Simply put, innovation and consumer protection mutually reinforce each other. Congress clearly recognized this reciprocal relationship in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) when it charged the Bureau to ensure “markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation”⁷ and to ensure that “outdated, unnecessary, and unduly burdensome regulations are regularly identified and addressed.”⁸

The development and market viability of innovative products require a flexible and receptive environment, which the Bureau plays a key role in fostering. If financial regulators, including the Bureau, fail to create such an environment, innovative companies will likely forego investments that would benefit U.S. consumers or invest abroad. Ultimately, talent and investment in financial services innovation will flow to countries where regulators support innovation through reducing regulatory uncertainty, exercising enforcement discretion, and ultimately, amending outdated and unduly burdensome rules. To combat these detrimental consequences, it is imperative that the United States encourage responsible innovation in the financial sector, whether by a new entrant, traditional financial institution, or by a joint initiative of the two. It is also critical that the Bureau support policies that promote access to affordable and accessible credit and other financial services for households and small businesses in underserved communities.

The 2016 Policy does not fulfill this mission and, ultimately, does not allow consumers access to all the products and services they want and that could improve their financial well-being. While the 2016 Policy asserts it “was intended to facilitate consumer access to innovative financial services,” it also states that no-action letters would be provided “rarely” and “only on

⁷ 12 U.S.C. § 5511(b)(5) (2012).

⁸ *Id.* § 5511(b)(3).

the basis of exceptional circumstances and a thorough and persuasive demonstration of the appropriateness of such treatment.”⁹

We welcome the establishment of an Office of Innovation within the Bureau’s Office of the Director, and applaud its commitment to supporting innovation by bank and nonbank financial technology providers. The proposed changes to the 2016 Policy and the Sandbox demonstrate the Bureau’s commitment to encouraging responsible, consumer-friendly innovation that will promote financial inclusion, expand access to credit, and improve consumer access to information—all of which should give consumers greater control over their financial future and well-being. We also underscore the importance of inviting NAL and Sandbox applications for more traditional products and services that need legal clarity.

To encourage use of the NAL program, we ask the Bureau to align the policy with the well-established and effective programs of other federal regulators, including the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC).

II. Strengthen the Protection Provided by a NAL and Sandbox Trial.

- a. *A NAL should express, as appropriate, the Bureau’s determination that the product or service in question is not unfair, deceptive, or abusive.*

The 2016 Policy was limited to a single form of relief, a non-binding recommendation that “staff has no *present* intention to recommend initiation of an enforcement or supervisory action against the requester in respect to the particular aspects of its product under the specific identified provisions and applications of statutes or regulations that are the subject of the No-Action Letter.”¹⁰ Additionally, in the preamble to the 2016 Policy, the Bureau made it clear that NALs focused on unfair, deceptive, and abusive acts and practices (UDAAP) would be “particularly uncommon” because whether an act or practice is unfair, deceptive, or abusive “is typically an intensely factual question that requires detailed consideration of a wide range of potentially relevant considerations.”¹¹

In contrast, the Proposal includes no temporal limitation and expresses no limitations on the Bureau’s willingness to consider UDAAP liability. As proposed, a NAL will:

State that subject to good faith and substantial compliance with the terms and conditions of the letter, and in the exercise of its discretion, the Bureau will not make supervisory findings or bring a supervisory or enforcement action against the recipient(s) predicated on the recipient’s (or recipients’) offering or providing the describes aspects of the product or service under (a) its authority to prevent unfair, deceptive, or abusive acts and practices or (b) any other identified statutory or regulatory authority within the Bureau’s jurisdiction.¹²

⁹ Policy on No-Action Letters; Information Collection, 81 Fed. Reg. at 8691.

¹⁰ *Id.* at 8694.

¹¹ *Id.* at 8689.

¹² Policy on No-Action Letters and the BCFP Product Sandbox, 83 Fed. Reg. at 64,040.

As we commented in 2014, a NAL that does not include assurance against UDAAP liability has limited value due to the subjectivity of such claims. Therefore, we welcome the Bureau's willingness to analyze UDAAP issues on a case-by-case basis, and to underscore that "[i]mplicit in the statement under part (a) is that the Bureau has not determined that the acts or practices in question are unfair, deceptive, or abusive."¹³

b. The signatory granting the NAL and Sandbox Terms and Conditions Document must have full support of the Bureau.

According to the Proposal, a NAL and Sandbox Terms and Conditions Document will be signed by the Assistant Director of the Office of Innovation or other members of the Office of Innovation, duly authorized by the Bureau, which is intended to assure the recipient that "the Bureau itself stands behind the no-action relief provided by the letters."¹⁴

The 2016 Policy disclaimed any intention for the NAL to be an interpretation by the Bureau of the statutes and rules identified in the request.¹⁵ We are pleased that the current Proposal includes no such disclaimer.¹⁶

Further, consistent with the Bureau's expression of intent to bring "aspects of the Bureau's policy more into alignment with no-action letter programs offered by other Federal regulators,"¹⁷ we recommend, as appropriate, that a NAL state affirmatively that its issuance represents the Bureau's conclusion that the proposed product or service, implemented consistently with the terms and conditions of the letter, does not violate applicable Federal consumer financial law, including the prohibition on UDAAP.¹⁸

c. The Bureau's interpretation of Federal consumer financial laws should be granted deference.

We recommend that the final NAL and Sandbox policy emphasize the deference assigned by Congress to the Bureau's interpretation of federal consumer financial law¹⁹ in order to encourage courts, other regulators, and private litigants to defer to the NAL or Sandbox approval. The final policy should also acknowledge that any attempt by a state regulator or private litigant to hold the NAL recipient or Sandbox participant liable under state law would chill use of the NAL and Sandbox program, which in turn would deter responsible innovation. In the event products or services subject to a NAL are challenged, we believe these statements will encourage courts to defer to the Bureau's determination, as the expert agency, that the institution

¹³ *Id.* at 64,039 footnote 28.

¹⁴ *Id.* at 64,037

¹⁵ Policy on No-Action Letters; Information Collection, 81 Fed. Reg. at 8695.

¹⁶ We support this aspect of the Proposal to the extent it is permissible under the Administrative Procedure Act and other applicable law.

¹⁷ Policy on No-Action Letters and the BCFP Product Sandbox, 83 Fed. Reg. at 64,036.

¹⁸ An affirmative statement should be made, for example, when a no-action letter request presents a question about whether a proposed product, service, or delivery mechanism complies with a particular requirement of a Federal consumer protection law or regulation.

¹⁹ 12 U.S.C. § 5512.

was operating in conformance with applicable law.²⁰ The addition of these statements also may discourage state and federal regulators as well as private litigants from initiating a claim against the product or service that is subject to a no-action letter.

In the preamble to the final policy, we encourage the Bureau to express its intention to participate as an *amicus curiae* in a private litigation involving a product or service that is the subject of a NAL. In that capacity, the Bureau can remind the court that the Bureau, interpreting a statute or regulation it is charged with enforcing, has found the product or service to be in compliance.

- d. The Bureau must achieve internal agreement that an enforcement action will not be pursued to assure industry participants relying on a NAL or Sandbox exemption or approval.*

For institutions to rely confidently on a NAL or participate in a Sandbox trial, the Bureau must have internal agreement that supervision and enforcement will not pursue punitive actions. There may be occasions when an innovation promises to benefit consumers, but presents legal and policy questions that are unclear or are not yet fully developed. In these instances, we support the proposed commitment by the Assistant Director (or a staff member) of the Office of Innovation not to make supervisory findings or bring an enforcement action.

To strengthen further the protection provided by a NAL or Sandbox exemption or safe harbor, we encourage the Bureau to include in the final policy requirements for internal consultation modeled on the process adopted by the SEC for issuance of a no-action letter. To assure potential applicants that the SEC stands behind a NAL, it has implemented procedural controls that require staff of the division that received the NAL application²¹ to confer with the enforcement division and the Office of General Counsel. While the enforcement division may not have proposed the legal conclusions or interpretation in the proposed NAL, it is imperative that enforcement agrees that it will not pursue an enforcement action if a NAL is granted. In addition, SEC procedures require staff to send SEC commissioners and other divisions “advice memos” describing the proposed NAL. If after a defined period of time, neither the commissioners nor the other divisions object, staff will issue the NAL. These internal procedures guide the agency’s internal vetting of the NAL and, ultimately, produce the necessary assurances to industry participants that NALs will preclude supervisory or enforcement action for participants that comply with their terms.

We recommend the adoption of similar requirements for consultation within the Bureau. Specifically, we urge the final policy to include a requirement for Office of Innovation staff to confer with Supervision, Enforcement, and Fair Lending (SEFL) staff to secure their agreement not to make supervisory findings or initiate an enforcement investigation with respect to the product or service that is the subject of the NAL or Sandbox trial. In addition, we believe the final policy should require Office of Innovation staff to send an advice memo, which describes

²⁰ Courts should be even more inclined to assign deference to the Bureau in the Sandbox context because the Bureau is exercising its approval or exemptive authority expressly provided by statutes cited in the Sandbox proposal.

²¹ SEC action letters may be issued by Divisions of Corporation Finance, Investment Management, and Trading and Markets, and the Office of the Chief Accountant.

the proposed NAL or Sandbox and invites comment, to the Assistant Director of the Regulations, Markets and Research (RMR) division and the Bureau Director.²² While this process may require extension of the proposed 60-day approval timeframe, these procedural requirements are critical to assure applicants that the Bureau stands behind its NAL and Sandbox relief.

III. Termination of a NAL or Sandbox Trial Should be Prospective and Companies Must Be Afforded Adequate Wind-Down Time.

To encourage companies to use the NAL program and Sandbox, the Bureau should reframe the revocation discussion in the Proposal to avoid imposing liability on financial institutions for shortcomings of a new product or service that neither the institution nor the Bureau foresaw. Currently, the Proposal articulates three grounds for revocation: (1) failure to substantially comply in good faith with the terms and conditions of the letter; (2) a determination by the Bureau that the recipient's offering or providing the described aspects of the product or service is causing material, tangible, harm to consumers; and (3) a determination by the Bureau that the legal uncertainty, ambiguity, or barrier that was the basis for grant of a NAL has changed as a result of a statutory change or a Supreme Court decision.²³

We appreciate the Bureau's assurance that it "anticipates revocation to be quite rare," and that revocation for reasons other than the recipient's failure to comply in good faith will be prospective only.²⁴ However, to underscore its prospective application, we recommend the final policy refer to "termination" of a NAL or Sandbox rather than "revocation" as the former is forward looking and the latter seems more retroactive in nature. This terminology and practice is consistent with that of the SEC and CFTC.

In addition, the final policy should note that termination for reasons other than the recipient's failure to comply in good faith is not a finding of fault with the institution. Currently, the Proposal states termination can occur as a result of a determination by the Bureau that the recipient's offering or providing the described aspects of the product or service is causing "material, tangible, harm to consumers." This undefined standard is entirely subjective. We urge the Bureau to recast as the explanation as a determination by the Bureau "that the product or service did not perform as intended."

Further, we believe the final NAL policy, like the proposed Sandbox policy, should give recipients whose NAL is being revoked at least six months to wind down the activities involved, unless there is a compelling reason that require more expedient action.. In addition, the final NAL policy should include a commitment to confer with the company in order to determine an appropriate wind down period after termination, again unless there is evidence that expediency is necessary. Sudden terminations would be unfair to NAL recipients and will undermine the success of the program in the long-run.

²² We acknowledge that the Bureau has indicated a commitment to coordinating with the appropriate divisions, but we wanted to highlight the importance of this coordination.

²³ Policy on No-Action Letters and the BCFP Product Sandbox, 83 Fed. Reg. at 64,040.

²⁴ *Id.*

IV. The Bureau Should Lead Coordination with Other Regulators on Consumer Finance Matters.

The success of the proposed NAL policy also will depend on the Bureau's ability to coordinate with state and federal regulators, given their independent ability to enforce some consumer protection law without participation of the Bureau. As recognized by the United States Department of Treasury in its Report on Nonbank Financials, Fintech and Innovation, "[I]t is critical not to allow fragmentation in the financial regulatory system, at both the federal and state level, to interfere with innovation. Financial regulators must consider new approaches to effectively promote innovation, including permitting meaningful experimentation by financial services firms to create innovative products, services, and processes."²⁵

The proposed NAL policy expresses the Bureau's intention to coordinate with other federal and state regulators as appropriate to promote consistent regulatory treatment of consumer financial products and services and states that the Bureau is "interested in" entering into agreements with these authorities.²⁶ However, the Proposal puts the onus on the applicant to identify other governmental authorities with which the Bureau may coordinate.²⁷ As the primary regulator for consumer financial services, the Bureau should lead the coordination among federal and state regulators as it is better positioned to do so than the applicant.

We urge the Bureau to revise the Proposal to include a firmer commitment on the part of the Bureau to coordinate with other federal and state regulators, and to *lead* the efforts to create regulatory consensus around the product or service that is the subject of the NAL. The Bureau should ensure that other regulators understand the NAL program and request that other regulators defer to the Bureau's determination of whether an innovative product or service complies with Federal consumer protection law, recognizing that the Dodd-Frank Act granted the Bureau supervisory and enforcement authority for the enumerated consumer protection laws.

Similarly, we appreciate the Bureau's expression of intention to coordinate with other regulators that have chosen to limit their enforcement or other regulatory authority and "interest in entering agreements with State authorities that operate or plan to operate a State sandbox that would provide an alternative means of admission to the BCFP Product Sandbox."²⁸ We encourage the Bureau to coordinate with appropriate federal and state regulators as well as the Conference of State Bank Supervisors and its Vision 2020 program focused on harmonizing multi-state regulation and supervisory processes.

V. The Bureau Must Protect the Confidentiality of Data and Information.

The Proposal states that the Bureau intends to publish NALs on its website and in appropriate cases, a "version or summary of the application."²⁹ It also states that the Bureau may

²⁵ U.S. DEPT. OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: NONBANK FINANCIALS, FINTECH, AND INNOVATION 13-14 (2018), <https://home.treasury.gov/sites/default/files/2018-07/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financi....pdf>.

²⁶ Policy on No-Action Letters and the BCFP Product Sandbox, 83 Fed. Reg. at 64,040.

²⁷ *Id.* at 64,039.

²⁸ *Id.* at 64,044.

²⁹ *Id.* at 64,041.

publish denials of applications, including an explanation of why the application was denied, particularly if it determines that doing so would be in the public interest.³⁰ This transparency will inform market participants about the types of proposals that are more or less likely to receive approval, and the accompanying reasons for approval or denial will promote agency accountability for the NAL program.

The Proposal, however, also recognizes program participants' interest in confidentiality. Disclosure of information by the Bureau about the product or service and the legal analysis required by the Proposal – whether the request is granted or denied – could enable competitors to exploit the idea or otherwise add compliance or litigation risks. Therefore, we support the extensive discussion of the legal limits on the Bureau's ability to disclose confidential commercial or financial information, including confidential supervisory information and trade secrets. We strongly support the statement that the Bureau intends to draft a NAL and a Sandbox Terms and Conditions document "in a manner such that confidential information is not disclosed."³¹

To encourage program use and promote innovation, we recommend that the final policy provide greater assurances that information provided to the Bureau as part of the process of applying for a NAL or Sandbox trial will be protected from public disclosure under exemptions to the Freedom of Information of Act.³² The Proposal also states that the Bureau "anticipates" and "expects" that much of the information submitted by applicants and during their participation in the Sandbox will qualify as confidential information, including confidential supervisory information, which demands adequate protection.³³ A more explicit statement from the Bureau that confidential commercial and or financial information and confidential supervisory information is *protected* by FOIA exemptions 4 and 8³⁴ and the Bureau's rule on Disclosure of Records and Information (Disclosure Rule)³⁵ would provide greater assurance to potential applicants.

As discussed in section VII below, to encourage use of the NAL program and Sandbox, we encourage the Bureau to work closely and proactively with companies throughout the application process. We recommend that the final policy invite potential applicants to meet with Office of Innovation staff throughout the application process to answer questions and work through issues. Both parties should be able to have candid dialogues and applicants should be assured that the discussions will be confidential. Therefore, we recommend that the Bureau follow the practice of the CFTC³⁶ and state in the final policy that information shared during

³⁰ Bureau's discussion of confidentiality with respect to no-action letter requests states that the Bureau "may" also publish denials and reasons for denial. A similar discussion in Part II regarding the confidentiality of Product Sandbox applications, terms and condition documents, and denials states that that the Bureau "intends to publish" denials. It is unclear whether this different treatment is intentional, but we urge consistent treatment that affords companies with appropriate protection of confidential information while providing information to the public about denials.

³¹ Policy on No-Action Letters and the BCFP Product Sandbox, 83 Fed. Reg. at 64,041, 64,045.

³² 5 U.S.C. § 552 (2012).

³³ Policy on No-Action Letters and the BCFP Product Sandbox, 83 Fed. Reg. at 64,041, 64,045.

³⁴ 5 U.S.C. § 552(b)(4), (b)(8).

³⁵ 12 C.F.R. pt. 1070 (2017).

³⁶ 17 C.F.R. § 145.9 (2018).

these discussions that qualifies as confidential commercial, financial information, or confidential supervisory information (CSI) will be protected from disclosure under FOIA exceptions or the Bureau's Disclosure Rule, as appropriate.

VI. Amend Rules Shown to Warrant Reconsideration Based on Experience with a NAL.

The Proposal states that NALs will have an unlimited duration, and it limits a NAL to the entity or entities that applied for the relief. We urge the Bureau to account for experience with or evidence gathered through the NAL and Sandbox process to, when appropriate, amend certain regulations or provide guidance clarifying an interpretation of a rule or statute. By amending unnecessary, or outdated rules or clarifying ambiguities through guidance, the Bureau will create a level playing field so all market participants know and benefit from the interpretation. The Associations urge the Bureau to commit to initiating a rulemaking to amend relevant regulations or to issuing guidance (after providing the opportunity for public comment) based on the information learned through the NAL and Sandbox programs.

VII. Ensure the NAL and Product Sandbox Programs are Collaborative, Fair, and Transparent.

a. Build strong collaborative relationships with NAL and Sandbox participants.

The Associations believe that building strong, collaborative relationships with program participants will be crucial to the success of the Bureau's NAL and Sandbox programs. To achieve this goal, we encourage the Bureau to take practical steps that allow it to work closely and proactively with companies throughout the application process. Such steps could include the early offer of voluntary "check point" meetings that make clear that the Bureau will dedicate necessary time to working through questions raised throughout the application process. The Bureau could also host forums (attended by current and former program participants) to discuss the process, successes, and areas of improvement. In addition, the Bureau could create a "No-action Letter/Sandbox Highlights" document to provide insight into both programs, including describing applications that were approved and those that were not in a confidential manner. This format would be similar to the "Supervisory Highlights" that are supported and widely relied on by industry.

We also believe it is critical for both programs' success that the Bureau convey – preferably in the preamble to the final policy – that the programs will be consistent, regardless of who holds the role of director of the Bureau or leads the Office of Innovation. The CFTC and SEC processes are effective because the agencies have established a track record demonstrating that companies can rely on the agencies' assurances. While a culture of trust will take time to develop, we believe that taking these steps will help the Bureau further demonstrate its commitment to responsible innovation—and thereby greatly enhance the likelihood that the NAL and Sandbox programs have long-term success.

b. Clarify elements of the Proposal to avoid unnecessary confusion and to promote fairness and transparency.

The Associations support the Bureau's commitment to advancing the Dodd-Frank Act's complimentary goals of identifying and addressing outdated, unnecessary, or unduly burdensome regulations in order to ensure that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation. Uncertainty about the meaning of key terms in the Proposal or about how those terms will be construed in practice may frustrate this goal. This is particularly true given the two-year timeframe for most Sandbox trials and the unlimited duration of NALs. Because activities covered under the NAL or Sandbox may span leadership changes at the Bureau, the Bureau should take all reasonable steps to clarify key elements of the Proposal in a way that avoids unnecessary confusion and uncertainty.

We urge the Bureau to address the following:

- *Illustrate when an applicant should pursue no action relief under the NAL or Sandbox programs.* The summary of the Proposal notes that the Sandbox offers approvals and exemptions by order as well as no-action relief that is “*substantially the same as that available under Part 1.*”³⁷ As a practical matter, however, the Proposal does not articulate why no-action relief is available under both programs or factors that would help an applicant determine whether to apply for no-action relief under Part 1 or Part 2. We recommend that the final policy offer potential applicants guidance on the appropriate path to pursue.
- *Relatedly, clarify whether a company seeking approval or exemptive relief should also submit a separate application for no-action request for UDAAP relief, as appropriate.* A company that seeks an exemption under ECOA or TILA may also want assurance that the Bureau will not make supervisory findings or bring an enforcement action under UDAAP. The Proposal states that a Sandbox Terms and Conditions Document will state, “[S]ubject to good faith compliance with the terms and conditions of the document, and in the exercise of its discretion, the Bureau will not make supervisory findings or bring an enforcement action against the recipient(s) predicated on the recipient’s (or recipients’) offering or providing the described aspects of the product or service under (a) its authority to prevent unfair, deceptive, or abusive acts or practices.”³⁸ It is unclear whether this statement will be included in every Terms and Conditions Document, or whether a company must request no-action relief, as necessary.
- *Clarify how the Bureau will consider applications submitted by a trade association, service provider, or other third-party.* We welcome the Bureau’s intent to consider applications by third-parties. We ask that the Bureau describe the particular steps that the relevant group should take to apply for approval of a NAL or Sandbox application and what notice its constituent members should take prior to relying on such approval. We urge the Bureau to work with a trade association on an industry-wide NAL or Sandbox

³⁷ Policy on No-Action Letters and the BCFP Product Sandbox, 83 Fed. Reg. at 64,037 (emphasis added).

³⁸ *Id.* at 64,044.

application, which once approved, would be posted on the Bureau’s website. A company wishing to use the relief would notify the Bureau and, in the Sandbox context, agree on the required data collection requirements.

- *Confirm that the NAL and Sandbox programs are not limited to addressing ambiguities arising from new products or services.* Nothing in the NAL or Sandbox application process suggests that the product or service in question must be new or innovative. Rather, all that is required is “[i]dentification of the statutory or regulatory provisions from which the applicant seeks relief and an identification of the potential uncertainty, ambiguity, or barrier that such relief would address.”³⁹ We agree that NAL and Sandbox relief should be available to address questions regarding existing products and services and legal questions, and we urge the Bureau to state this explicitly in the final policy.
- *Ensure a consistent framework for NAL and Sandbox compliance.* We ask the Bureau to institute a consistent process of oversight for both supervised and non-supervised institutions.

VIII. Specific Comments on the Proposed Product Sandbox Policy.

We commend the Bureau for attempting to offer further legal certainty to companies, which through serving consumers in innovative ways, encounter areas where the law is unclear. To bring innovations to market, banks and financial technology companies should be able to adopt the same innovative design practices followed by leading non-financial technology firms. Innovation requires constantly testing products, tweaking the design, and rolling out updates. Working in a complex regulatory environment makes these iterative processes difficult.

Regulatory support can help by empowering banks to bring new products to market more quickly and encouraging innovation in financial services. With our complex set of consumer finance laws and regulations, there are many grey areas where companies need clarity in order to test new products, services, and delivery mechanisms. Moreover, many existing laws and regulations have become outdated in light of technological advances.

When new technologies challenge regulatory assumptions and raise questions, they should be explored by banks, regulators, and technologists together. Sandboxes like the one proposed by the Bureau can help facilitate the testing of new technologies with regulatory guardrails to ensure consumers remain protected. Proper implementation of pilot programs can help drive innovation that may benefit customers while minimizing the risk of unintended adverse consequences.

For a Sandbox to be effective, participants need assurances that they will not be penalized for participating. This often means that regulators must be flexible in applying regulations that would restrict the testing of new technologies and apply relief where appropriate. Accordingly, in addition to no-action relief, the Bureau proposes two additional forms of relief for Sandbox participants:

³⁹ *Id* at 64,039, 64,042.

- *Approval relief:* Exercising its authority under the Truth in Lending Act (TILA),⁴⁰ Equal Credit Opportunity Act (ECOA),⁴¹ and Electronic Funds Transfer Act,⁴² the Bureau can provide a “safe harbor” from liability; and
- *Exemptive relief:* This relief would be granted to the extent of the Bureau’s authority to grant exemptions by order from statutory provisions of ECOA,⁴³ the Home Ownership and Equity Protection Act (HOEPA),⁴⁴ and the Federal Deposit Insurance Act (FDI Act)⁴⁵ or from regulatory provisions that are not required by statute.

Under both forms of relief, the recipient would be immune from federal or state enforcement actions as well as private lawsuits brought under these laws.

These additional forms of relief are critical to foster trust and encourage innovation. Because areas of legal uncertainty arise from the fragmented set of consumer finance laws and regulations, companies and service providers need clarity in order to test new products, services, and delivery mechanisms. Moreover, many existing laws and regulations have become outdated in light of technological advances. We strongly support the Bureau’s effort to create an environment where innovation can be tested with proper consumer protection guardrails.

As indicated above, while the NAL and Sandbox share much in common, a few areas warrant distinction between the two processes. As an initial matter, we request clarity on when the Bureau believes an applicant should use the trial disclosure process, apply for a NAL, or apply for admission to the Sandbox. We also ask that, during the preliminary discussions, the Bureau discuss with the applicant which process will be best suited for the product or service proposed by the institution.

In addition, we urge the Bureau to address the following:

- *The data that will be collected from the institution, and how the data will be protected and stored.* Sensitive data collected from the institution pursuant to a Sandbox application and during a trial must be adequately protected. Much of this data will be proprietary business information that should be protected under exception four of FOIA. Since the Bureau has exemptive authority for the statutes under the Sandbox proposal, it should be the only regulator with access to the data. Further, the Bureau should ensure its information security protections are up to date and can adequately protect the information. As we have seen, federal government agencies are not immune to data breaches and can often be key targets of nefarious actors.

⁴⁰ 15 U.S.C. § 1640(f) (2012).

⁴¹ *Id.* § 1691(e)(e).

⁴² *Id.* § 1693(m)(d).

⁴³ *Id.* § 1691(c-2)(g)(2).

⁴⁴ *Id.* § 1639.

⁴⁵ 12 U.S.C. § 1831(t)(d) (2012).

- *The process that the Bureau will follow to bring a product or service to market after a successful Sandbox trial.* We support the proposal to permit Sandbox participants to request extensions as well as the Bureau’s assurances that it “[a]nticipates permitting longer extensions where the Bureau is considering amending applicable regulatory requirements. During the time period pending a rule amendment, the Bureau intends to consider a means of providing similar relief to other covered entities that engage in the same or similar conduct in offering or providing comparable products.”⁴⁶ Doing so accomplishes two Dodd-Frank Act objectives: (1) identifying rules that warrant amendment because they are outdated, unnecessary or unduly burdensome and (2) creating a level playing field.
- *The Bureau’s plans for mitigating possible competitive disadvantages for companies that want to be in the Sandbox and offer similar products that have already been approved.* There is a higher barrier of entry for the Sandbox, which creates the potential for unfairness to companies operating outside the Sandbox. We ask the Bureau to mitigate the risk of an un-level playing field and ensure that companies that want to offer products and services similar to those currently being tested in a Sandbox are able to do so with the right precautions. We recommend the Proposal include an expedited approval process for other companies interested in offering comparable products or services.
- *The Bureau’s plans to report publically about Sandbox trials and to mitigate any competitive disadvantage arising from operating outside the Sandbox.* We urge the Bureau to follow the example of the U.K.’s Financial Conduct Authority and report out regulatory or business “learnings,” but not proprietary information, as soon as possible following completion of the trial period, so the public can learn from the trial. In addition, the Bureau should make it clear to the public that companies can responsibly offer innovative products outside the Sandbox in order to avoid implicitly suggesting that Sandbox participation shows good faith and that testing a product outside the Sandbox does not.
- *Clarify what constitutes “material harm” for purposes of restitution.* We agree that if consumers are harmed from a Sandbox trial, participating companies should ensure consumers are remediated fully. To provide certainty and encourage Sandbox applications, we ask the Bureau to define “material harm” so companies will know when remedial actions are necessary. In addition, the Bureau should adopt a threshold for when remediation is required.

IX. Conclusion

The Associations appreciate the opportunity to comment on the Proposal and look forward to working with the Bureau to solve challenging questions that will inevitably arise.

⁴⁶ Policy on No-Action Letters and the BCFP Product Sandbox, 83 Fed. Reg. at 64,044.

Please do not hesitate to contact any of the undersigned with questions or to discuss our comments.

Sincerely,



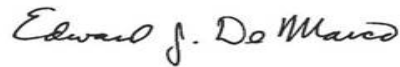
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